



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 19, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-37

Keith A. Davis
Treasurer
Americans for a Better Country
228 S. Washington Street
Alexandria, VA 22314

Dear Mr. Davis:

This responds to your letter dated November 18, 2003, requesting an advisory opinion on behalf of Americans for a Better Country ("ABC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), and Commission regulations to a variety of political activities. ABC is an unincorporated, non-connected political committee organized under Section 527 of the Internal Revenue Code with Federal and non-Federal accounts that registered with the Commission on September 4, 2003. As always, this Advisory Opinion is premised on the specific facts and circumstances posited in your request. See 11 CFR Part 112. The fact that ABC is a political committee is particularly relevant. This opinion does not set forth general standards that might be applicable to other tax-exempt entities.

Background

Your request concerns the raising and spending of Federal and non-Federal funds for a wide range of campaign activities. Some of your proposed activities involve public communications regarding specific Federal candidates, or Federal candidates holding positions on issues of importance to ABC. The activities proposed in your request appear to include only one communication that involves a specific non-Federal candidate. Your proposed activities also include voter mobilization programs. In addition, you seek guidance on coordinating these campaign activities with Federal candidates and their

agents, and having Federal candidates assist ABC by soliciting funds for ABC's proposed activities.¹

Legal Analysis and Conclusions

Introduction

The Commission concludes that the activities about which you inquire fall into a few general categories. Many of the activities about which you inquire are covered by the existing allocation regulations in 11 CFR Part 106. Some are generic voter drives governed by 11 CFR 106.6(b)(2)(iii). Other communications by ABC must be treated as a combination of expenditures for Federal candidates and disbursements for non-Federal candidates allocable under 11 CFR 106.1.

You also ask about certain communications that refer to a clearly identified Federal candidate, but that do not expressly advocate the election or defeat of that candidate. Prior to the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. ___, 124 S.Ct. 619, 687 (2003), many believed that "*Buckley v. Valeo*, 424 U.S. 1 (1976)] drew a constitutionally mandated line between express advocacy and so-called issue advocacy" such that for present purposes only communications that contained express advocacy were considered "expenditures" that had to be paid for with funds subject to the limitations and source prohibitions of the Act. In *McConnell*, the Supreme Court clarified that the express advocacy test is not a constitutional barrier establishing whether communications are "for the purpose of influencing any Federal election," which is the operative term used in the definition of "expenditure" in 2 U.S.C. 431(9). 124 S.Ct. at 688-689. In short, there is no statutory requirement and, in light of *McConnell*, no Constitutional requirement, that express advocacy be the basis for distinguishing which of a Federal political committee's proposed communications may be paid for with Federal funds and which may be paid for with non-Federal funds, i.e., funds that are not subject to the Act's limitations and source prohibitions.

The Supreme Court also upheld a key provision of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (Mar. 27, 2002) ("BCRA") regulating public communications by officeholders and party committees that promote, support, attack, or oppose a clearly identified Federal candidate (2 U.S.C. 431(20)(A)(iii)), finding that such communications "undoubtedly have a dramatic effect on Federal elections. Such ads were a prime motivating force behind BCRA's passage... [A]ny public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating." *McConnell*, 124 S.Ct. at 675. Moreover, the Court found that the regulation of these communications survives constitutional vagueness concerns because the terms "promote," "support," "attack" and "oppose" are explicit standards giving "the person of

¹ This advisory opinion reorganizes and combines certain questions, and answers certain other questions as a group. Attached to this advisory opinion as Appendix A is your letter dated November 18, 2003, annotated with bracketed paragraph numbers that will be referred to throughout this opinion.

ordinary intelligence reasonable opportunity to know what is prohibited.” *McConnell* at 675, n.64, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Under BCRA, these public communications cannot be paid for with non-Federal funds by Federal, state and local officeholders or party committees. 2 U.S.C. 441i(a), (b), (e) and (f).

The Commission recognizes that political party committees have characteristics not shared by all political committees regulated under FECA. Nevertheless, the promote, support, attack, or oppose standard is equally appropriate as the benchmark for determining whether communications made by political committees that refer only to clearly identified Federal candidates are made for the purpose of influencing any Federal election and must be paid for with Federal funds. By their very nature, all Federal political committees, not just political party committees, are focused on the influencing of Federal elections. As organizations whose “major purpose is the nomination or election of a candidate,” political committees do not raise the same concerns about vagueness that may arise in other contexts when interpreting the definition of “expenditure.” Expenditures of political committees “can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).² Moreover, communications that promote, support, attack or oppose a clearly identified Federal candidate have no less a “dramatic effect” on Federal elections when aired by other types of political committees, rather than party committees or candidate committees.³

ABC proposes to fund certain activity that may be paid for with a mix of Federal and non-Federal funds. Commission regulations provide that, with respect to a political committee with separate Federal and non-Federal accounts (such as ABC), “[a]ll disbursements, contributions, expenditures, and transfers . . . in connection with any Federal election shall be made from its Federal account” (except as otherwise permitted with respect to State, district, and local party committees under 11 CFR Part 300). 11 CFR 102.5(a)(1)(i). The proper allocation of certain activities by a non-connected political committee such as ABC is set by 11 CFR Part 106.

Under 11 CFR 106.1, expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate, shall be allocated to each such candidate according to the benefit reasonably expected to be derived; e.g. by the space and time devoted to each candidate in a printed or broadcast message, or statements in a phone bank message, as compared to the total space or time devoted to all the candidates. This also applies to allocating payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates. 11 CFR 106.1(a).

² See also *McConnell*, 124 S.Ct. at 678 n.67 (stressing that “[s]ection 527 political organizations are, unlike section 501(c) groups, organized for the express purpose of engaging in partisan political activity.”).

³ In making this determination, the Commission is in no way addressing the legal status of organizations that are not political committees under the Act, including organizations operating under section 501(c)(3) and section 501(c)(4) of the Internal Revenue Code. The Commission will address the legal status of such organizations in a rulemaking this Spring.

For communications by a non-connected political committee that are for voter identification, voter registration, or get-out-the-vote purposes that are not coordinated with a candidate and that do not refer to any clearly identified Federal candidate, Commission regulations at 11 CFR 106.6 require the use of at least some Federal funds because they are in part for the purpose of influencing a Federal election. Commission regulations provide that such committees shall allocate expenses for:

Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

11 CFR 106.6(b)(2)(iii).⁴ The expenses for such purposes shall be allocated between the Federal and non-Federal accounts of the non-connected committee based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year Federal election cycle.⁵

You have also asked a number of questions about the possible application of BCRA's electioneering communications provisions to ABC's proposed activities (e.g., paragraphs [6], [7], [8], [64A], [64B], and Exhibit E). As explained below, it is not necessary to apply the electioneering communications provisions of the Act and Commission regulations to respond to your request. An "electioneering communication" is a "broadcast, cable or satellite" communication that refers to a clearly identified candidate, is publicly distributed for a fee within 60 days of a general election or 30 days of a primary or preference election or nominating convention or caucus, and that is, in the case of a communication that refers to a Congressional candidate, "targeted to the relevant electorate."⁶ 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29.

⁴ The same allocation method applies to non-connected committees' "[a]dministrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate[.]" See 11 CFR 106.6(b)(2)(i) and (c).

⁵ The ratio shall be estimated and reported at the beginning of each cycle, and subsequent adjustments, accompanied by transfers, are made with respect to each reporting period. 11 CFR 106.6(c)(1) and (2). For the purposes of the ratio, the Federal expenditures shall include only amounts contributed to or otherwise spent on behalf of specific Federal candidates, including independent expenditures, and amounts spent on communications that promote, support, attack, or oppose a clearly identified Federal candidate. The calculation of disbursements for the total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs. 11 CFR 106.6(c)(1).

⁶ A communication is "targeted to the relevant electorate" if it can be received by 50,000 or more persons in the State an identified candidate for the Senate seeks to represent or the congressional district an identified candidate for the House of Representatives seeks to represent. 2 U.S.C. 434(f)(3)(C); 100.29(a)(5). In the case of a candidate for nomination for President or Vice President, a communication is publicly distributed if it can be received by 50,000 or more persons in a State where a primary election is being held within 30 days, or if it can be received by 50,000 or more persons anywhere in the United States between 30 days before the first day of the nominating convention and its conclusion. 11 CFR 100.29(b)(3).

The Act and Commission regulations set forth four exceptions to the definition of “electioneering communication.” 2 U.S.C. 434(f)(3)(B); 11 CFR 100.29(c). One of these statutory exceptions covers communications that are expenditures or independent expenditures under the Act. 2 U.S.C. 434(f)(3)(B)(ii). The Commission determined that communications that would otherwise meet the definition of electioneering communications are, in fact, expenditures when made by a political committee and must be reported as such. “Electioneering Communications; Final Rules,” 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002); *see also* “Bipartisan Campaign Reform Act of 2002; Reporting; Notice of Proposed Rulemaking,” 67 Fed. Reg. 64,555, 64,561 (October 21, 2002).⁷ Accordingly, Federal political committees, by operation of the expenditure and independent expenditure exemption in 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3), are not subject to BCRA’s electioneering communication provisions. Therefore, any communications paid for by ABC that otherwise would be electioneering communications as defined by the Act, 2 U.S.C. 434(f)(3), and described in the Commission’s regulations, 11 CFR 100.29(a), must be reported as expenditures and comply with the requirement that expenditures be Federally funded.

1. *Given that ABC’s “express purpose” [2] [20] and “message” [26] is “the election and defeat” [26] [20] of particular Federal candidates,*
 - (a) *May ABC, or its agents, solicit or direct non-Federal funds [47]?*
 - (b) *May ABC use non-Federal funds to pay for any of its activities [26] [27]⁸?*

The paragraphs of your request addressed in this question largely present general questions of interpretation, and thus do not qualify as an advisory opinion request. 11 CFR 112.1(b). As explained above, political committees may maintain Federal and non-Federal accounts, 11 CFR 102.5, and may allocate certain payments between Federal funds and non-Federal funds, *see, e.g.*, 11 CFR 106.6(b)(2)(iii) (allocation of expenses for generic voter drives by non-connected political committees). Thus, ABC may raise non-Federal funds, and spend such funds as permitted by the Act.⁹ More specific guidance is provided below in the context of more specific questions.

Coordination with Federal Candidates and Political Party Committees

⁷ The Court in *McConnell* agreed with the Commission’s conclusion. It stated, “issue ads broadcast during the 30- and 60-day periods preceding Federal primary and general elections are the functional equivalent of express advocacy.” *McConnell* at 696. The Court also recognized that “corporations can still fund electioneering communications with PAC money,” i.e., Federal or “hard” money. *Id.* at 695.

⁸ The Commission does not address the questions in paragraph [27] pertaining to the activities of donors of non-Federal funds. These are activities of third parties and not that of the requestor. *See* 11 CFR 112.1(b) (which states that requests regarding the activities of third parties do not qualify as advisory opinion requests). Indeed, your request could implicate many third parties, who may find themselves in a wide variety of circumstances.

⁹ An expenditure is considered to be a contribution to a candidate when it is “made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of,” that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Also, an expenditure is not “independent” if it is “made in cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, authorized committee, or a political party committee. *See* 11 CFR 100.16.

[9],[11] to [17], [18], [28] to [36], and [62]

Several paragraphs of your advisory opinion request directly raise issues as to “coordination” between ABC and candidates for Federal office and/or political party committees. *See, e.g.*, paragraphs [11]-[17], [18] (second question), [28]-[36], and [62] of your request. Under 2 U.S.C. 441a(a)(7) and 11 CFR 109.20(a), “coordinated” means, “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents” Any expenditure that is coordinated under 11 CFR 109.20(a), but that is not made for a coordinated communication under 11 CFR 109.21 or a coordinated party expenditure under 11 CFR 109.37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated, and “must be reported as an expenditure made by that candidate or political party committee,” unless otherwise exempted. 11 CFR 109.20(b).

The regulations in 11 CFR 109.21 set forth a three-pronged test for the purpose of determining whether a communication is coordinated with one or more candidates for Federal election, an authorized committee, a political party committee, or an agent of any of the foregoing. If the three-pronged test is satisfied, then the payments for the communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions. First, the communication must be paid for by someone other than that candidate, authorized committee, political party committee, or an agent of any of the foregoing. 11 CFR 109.21(a)(1); *see also* 11 CFR 109.37. The second prong is a “content standard” regarding the subject matter of the communication. 11 CFR 109.21(a)(2). Four types of communications satisfy the content standard: (1) a public communication that expressly advocates the election or defeat of a clearly identified Federal candidate (no matter when made); (2) a public communication that disseminates, distributes or republishes campaign materials (no matter when made); (3) electioneering communications; and (4) a public communication directed to voters in a particular area that refers to a political party or a clearly identified Federal candidate and that is disseminated 120 days or fewer before a primary, general, special or runoff election. *See* 11 CFR 109.21(c). The third prong is a “conduct standard” regarding the interactions between the person paying for the communication and the candidate, an authorized committee, a political party committee, or agents of the foregoing. 11 CFR 109.21(a)(3). These conduct standards include: (1) “requests or suggestions” for communications by candidates or political party committees; (2) substantial discussions regarding candidate or political party campaign plans, projects, activities, or needs; (3) “material involvement” in the making and airing of communications; (4) the involvement of “common vendors;” and (5) the involvement of individuals who were formerly employees or independent contractors of a candidate, an authorized committee, or a political party committee. 11 CFR 109.21(d)(1) – (5).¹⁰

¹⁰ In order to meet this fifth conduct standard, the former employee or independent contractor must use or convey information. 11 CFR 109.21(d)(5). The Commission considered and rejected a standard in which previous employment would, by itself, be sufficient to satisfy this conduct standard. *See* 68 Fed. Reg. at 438

The Commission cannot resolve, without more specific information, whether the communications you generally describe are coordinated communications. As such, your questions about coordination are hypothetical, presenting general questions of interpretation of the Act, rather than specific transactions or activities, and are thus not proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).¹¹

In addition to the paragraphs of your request that directly raise issues about coordination, discussed above, some of your other paragraphs raise the possibility that a number of ABC's planned activities described below might be coordinated with one or more candidates for Federal office, authorized committees of Federal candidates, political party committees, or the agents of any of the foregoing. *See, e.g.*, paragraphs [6]-[8], [24]-[27],¹² [38]-[39], [48]-[49], [52]-[54], [57]-[60], [64], and [67]-[70] of your request. To the extent that the activities you describe in those questions would result in a coordinated communication within the meaning of 11 CFR 109.21, the payment for such communications would constitute an in-kind contribution to a candidate for Federal office or to a political party committee. Such contributions must be paid for entirely with Federal funds and are subject to ABC's contribution limits under 2 U.S.C. 441a(a)(1) or (2). Thus, the Commission conditions its responses to the questions discussed below on the assumption that these activities are not coordinated with a Federal candidate, authorized committee, political party committee, or agents of any of the foregoing. 2 U.S.C. 441a(a); 11 CFR 100.52(d)(1), 11 CFR 109.20 and 109.21.¹³

Coordination with non-profit organizations

("The Commission notes that the final rule focuses only on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee."). Likewise, to meet the fourth conduct standard – which turns on the involvement of common vendors – the common vendor must use or convey information. 11 CFR 109.21(d)(4)(iii). See also 11 CFR 109.21(d)(3) (A discussion is "substantial" within the meaning of the "substantial discussion" conduct prong only "if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication . . .").

¹¹ In paragraph [9] you ask whether an individual contributing non-Federal funds to ABC "for the express purposes of 'reelecting the President' or 'defeating' his Democratic opponent" may also hold a fundraiser for the President. This question relates entirely to the activities of a third-party contributor and you do not supply any indication that you are an agent of that potential contributor or are otherwise authorized to request an advisory opinion on that person's behalf. Under the Act and Commission regulations, a request on behalf of a requesting person must be made by an "authorized agent of such person." 2 U.S.C. 437f(a)(1) and 11 CFR 112.1(a). As your question concerns the activities of a third party, it is not a proper advisory opinion request.

¹² While you state in paragraphs 24 and 25 that the contemplated activities will not be coordinated with a Federal candidate, you do not address whether the activities will be coordinated with a political party committee or its agents.

¹³ The Act, as amended by BCRA, and Commission regulations prohibit national committees of political parties, their officers and agents, and any entities established, financed, maintained or controlled by such committees from soliciting, receiving, spending, or directing to another person, non-Federal funds (i.e., funds that are not subject to the limitations, prohibitions, or reporting requirements of the Act). 2 U.S.C. 441i(a); 11 CFR 300.10. For the purposes of this opinion, the Commission accepts your representation that ABC is an independent political committee that is not affiliated with any Federal candidate, Federal officeholder or political party.

2. *You ask whether ABC may coordinate its activities with entities that are constituted as either IRC §527 political organizations or section 501(c)(3) organizations, and that are not Federal political committees. [35] and [36]*

While the Act and Commission regulations at 2 U.S.C. 441a(a)(7)(B) and 11 CFR Part 109 provide specific consequences for coordination with a candidate for Federal office, a candidate's authorized committee, or a political party committee, neither the Act nor Commission regulations expressly address coordination with other political committees and 527 political organizations or section 501(c)(3) organizations. Thus, ABC is not categorically prohibited from consulting with, or acting in concert with these other organizations. However, depending on the particular circumstances, such cooperation could be a factor leading to a conclusion that ABC controls or is otherwise affiliated with such a group, that the group is acting as ABC's agent, or that the group has made an in-kind contribution to ABC.

The Commission expresses no opinion regarding qualification for tax treatment under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal Revenue Code because those questions are outside the Commission's jurisdiction.

Agency

Your advisory opinion request presents numerous facts and questions that raise issues as to whether an individual is an agent¹⁴ of one or more organizations, including ABC. *See, e.g.*, paragraphs [12], [15], and [29]. The Commission cannot determine whether particular individuals are agents of ABC or other persons without more specific information. As the Commission previously noted in the Explanation and Justification for 11 CFR Part 109, it is difficult to determine whether an individual is acting as an "agent" in the abstract because "[t]he grant and scope of the actual authority, whether the person is acting within the scope of his or her actual authority, and whether he or she is acting on behalf of the principal or a different person, are factual determinations that are necessarily evaluated on a case-by-case basis in accordance with traditional agency principles." 68 Fed. Reg. 421, 425. Therefore, to the extent your questions require a determination of whether a particular person is an agent of ABC or another organization, the questions are hypothetical and present general questions of interpretation of the Act, rather than specific transactions or activities, and are thus not proper for an advisory opinion. 2 U.S.C.

¹⁴ Although Congress did not define the term "agent" in BCRA, the Commission has promulgated regulations at 11 CFR 300.2(b) that define an "agent" of a Federal candidate or officeholder for purposes of 11 CFR Part 300 (*i.e.*, the "soft-money" rules enacted to implement BCRA) as "any person who has actual authority, either express or implied," "to solicit, receive, direct, transfer or spend funds in connection with any election." The Commission also promulgated a similar definition of "agent" solely for the purposes of 11 CFR Part 109, which primarily addresses coordination between a person paying for a communication and a Federal candidate, authorized committee, or political party committee. 11 CFR 109.3. The Commission explained that this definition of "agent" is "based on the same concept that the Commission used in framing the definition of 'agent'" in part 300, described above. 68 Fed. Reg. 421, 423 (Jan. 3, 2003).

437f(a)(1); 11 CFR 112.1(b). Furthermore, in addressing the questions you present in this request, the Commission assumes without deciding that ABC directors and staff are not agents of a candidate for Federal office, an authorized committee of such candidate, a political party committee, or any other individual or entity.

Communications

3. *You indicate that ABC may fund a communication that states: “President George W. Bush, Senator X and Representative Y have led the fight in Congress for a stronger defense and stronger economy. Call them and tell them to keep fighting for you.” May ABC pay for this communication containing no express advocacy solely with donations from individuals that exceed the Act’s limitations? [6], [7]*

No. If the communication meets the criteria of an electioneering communication, it must be treated as an expenditure when made by a political committee. See introduction to the legal analysis.

Even if it does not have all the characteristics of an electioneering communication, it still must be treated as an expenditure and paid for entirely from ABC’s Federal account for the following reasons. The communication you intend to produce would promote or support candidates for Federal office by proclaiming that those candidates have “led the fight in Congress for a stronger defense and stronger economy.” As explained above in the introduction to the legal analysis, a payment for a communication that promotes, supports, attacks, or opposes a clearly identified Federal candidate is “for the purpose of influencing a Federal election” when made by a political committee and is therefore an “expenditure” within the meaning of 2 U.S.C. 431(9) that must be paid for entirely with Federal funds. Moreover, there is no basis under 11 CFR 106.1 for allocating the costs of this communication between ABC’s Federal and non-Federal accounts, because the communication refers only to Federal candidates. Nor is allocation between ABC’s Federal and non-Federal accounts permissible under 11 CFR 106.6. Those allocation provisions explicitly do not cover candidate-specific communications. See 11 CFR 106.6(b)(2)(i) and (iii). Consequently, because the payments for the communications you propose to run will be expenditures regulated under the Act, ABC must pay for these ads entirely with funds that comply with the Act’s various limitations, including individual contribution limitations.

4. *May ABC pay for communications within 60 days of a general election with funds from corporations, labor organizations, and trade associations, if the message is “President Bush is a strong leader. The War on Terror, cutting taxes, putting families and working people first. He has provided strong, common sense leadership for this nation. Call President Bush and tell him to keep fighting for a strong America.”? [64-Exhibit E]*

No. Similar to the answer to question 3 above, if the communications meet the criteria of electioneering communications, they must be treated as expenditures when made by a political committee. See introduction to the legal analysis.

Even if the communications do not have all the characteristics of an electioneering communication, they still must be treated as expenditures. The messages given as examples of these communications (*see* Exhibit E to the request, referred to in paragraph [64]), which you describe as “issue ads,” promote, support, attack, or oppose a clearly identified Federal candidate and do not refer to any non-Federal candidates. See the introduction to the legal analysis and the answer to question 3, above. Therefore, these communications must be paid for by ABC entirely with Federal funds. Because Federal funds cannot include corporate, labor organization, or incorporated trade association funds, ABC cannot pay for communications that promote, support, attack, or oppose a Federal candidate, with corporate, labor organization, or incorporated trade association funds.

5. *May ABC pay for “issue ads” within 60 days of a general election with corporate, labor organization, or trade association funds? [8]*

In paragraph [8], you ask generally “[s]ince ABC is an unincorporated entity, may it broadcast issue ads within 60 days of a general election paid for with funds that include contributions from corporations, unions and trade associations?” Because you do not provide a script for the “issue ads” referred to in paragraph [8], this is a hypothetical question calling for general interpretation of the Act. Thus, it is not a proper advisory opinion request. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

6. *ABC wishes to run communications, such as that which is attached to your request at Exhibit E, on television and radio within sixty days of a general election mentioning President Bush but not expressly advocating his election. May ABC fund these ads with donations from individuals in amounts that exceed Federal limits? [64-Exhibit E]*

No. As explained above in the introduction to the legal analysis, communications that might otherwise meet the definition of “electioneering communication” are treated as expenditures when made by a political committee.

Even if the communications do not otherwise meet the definition of “electioneering communication,” they must nonetheless be treated as expenditures for the following reasons. The communications you intend to produce would promote or support a candidate for Federal office by proclaiming “President Bush is a strong leader” who “has provided strong, common-sense leadership for this nation.” As explained above in the introduction to the legal analysis, a payment for a communication aired at any time that promotes, supports, attacks, or opposes a clearly identified Federal candidate is “for the purpose of influencing a Federal election” when made by a political committee, and is therefore an “expenditure” within the meaning of 2 U.S.C. 431(9) that must be paid for entirely with Federal funds. Moreover, because the communications refer only to clearly identified Federal candidates, allocation between ABC’s Federal and non-Federal accounts is not permissible under 11 CFR Part 106. See the answer to question 3, above. Consequently, because the communications you propose to run will be expenditures, ABC must pay for these ads entirely with funds that comply with the Act’s various limitations, including individual contribution limitations of 2 U.S.C. 441a(a).

7. *ABC wishes to run television and radio ads, such as those which are attached to your request at Exhibit E, more than sixty days before the general election that state that President Bush is a “strong leader” who “has provided strong, common-sense leadership for this nation.” May ABC fund these ads with either Federal or non-Federal funds? [65]*

ABC must pay for these ads with Federal funds. Allocation between ABC’s Federal and non-Federal accounts is not permissible under 11 CFR Part 106. See the answer to question 3, above.

Voter Registration, GOTV, and Voter Identification Activities

You ask a number of questions about funding for proposed communications tied to what you describe as voter registration and get-out-the vote (“GOTV”) activities. These questions are found at paragraphs [5], [6], [18 first question], [19], [26], [48], [52] through [61], [69], and [70]. They present a variety of messages in a variety of media, including direct mail, phone banks, and door-to-door distribution of material. You also ask about a specific voter identification communication [67]. With respect to some paragraphs, you also ask about the implications of BCRA on specific types of Federal election activity, as defined at 2 U.S.C. 431(20)(A)(i) and (ii) and 11 CFR 100.24(b)(1) and (2).¹⁵ However, as noted above, the Commission accepts the representation that ABC is not established, financed, maintained or controlled by a national, State, district or local party committee. Therefore, the provisions of 2 U.S.C. 441i that turn on those types of Federal election activity *by party committees* do not apply to ABC as if it were a party committee.

The Commission concludes that ABC’s voter drive activity is, entirely or in part, for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(9)(A)(i). This conclusion is buttressed by the Supreme Court’s finding in *McConnell* that “voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on Federal candidates ...” 124 S.Ct. at 675. The Court emphasized that “[g]eneric campaign activity has a direct effect on Federal elections.” *Id.* at 674 (internal quotations omitted). Commission regulations address: (1) communications by political committees that involve expenditures on behalf of clearly identified Federal candidates and/or disbursements on behalf of clearly identified non-Federal candidates, at 11 CFR 106.1; and (2) communications by political committees that are for voter identification, voter registration or GOTV purposes that are not coordinated with a candidate and that do not mention a clearly identified candidate, at 11 CFR 106.6(b)(2)(iii). Funding for such messages will depend in large measure on the application of the provisions in 11 CFR Part 106.

¹⁵ These include your references in paragraph [51] to voter registration activity that occurs more than 120 days before a Federal election and within the 120-day period and the reference in paragraph [58-Exhibit D] to GOTV activity that occurs within 72 hours of a Federal election and before that time period.

8. *May ABC use non-Federal funds to pay for voter registration and get-out-the-vote public communications that clearly identify a Federal candidate and that expressly advocate his election or defeat or otherwise promote, support, attack, or oppose the candidate? This question refers to communications in paragraphs [5], [26], [52], [57-Exhibit C], and [69]. This question also pertains to questions [54] and [60].*

No. Some of the messages contain specific phrases such as “vote for George W. Bush for President,” or “It’s your duty to register to vote so that you can support George Bush’s reelection as President of the United States.” These communications constitute express advocacy under 11 CFR 100.22(a).¹⁶ Other messages refer directly to an explicit act of support for a clearly identified candidate, such as “If you care about keeping the strong defense President Bush has put in place, go out and vote November 2.” These messages promote, support, attack, or oppose a clearly identified Federal candidate. Other messages promote, support, attack, or oppose a clearly identified Federal candidate in a different way. These include messages such as “President Bush has led the fight in Congress for a stronger defense and economy. Call him and tell him to keep fighting for you.”

The communications in paragraphs [52-Exhibit A], [54-Exhibit A], [57-Exhibit C], and [60-Exhibit C] present messages that clearly identify only one Federal candidate and expressly advocate his election while at the same time urging generic support for the entire party ticket (referred to in Exhibits A and C as “the entire Republican team”). As such, part of the message is attributable to the clearly identified candidate according to the benefit reasonably expected to be derived (*see* 11 CFR 106.1(a)), with the remaining generic part of the message allocable between ABC’s Federal and non-Federal accounts under 11 CFR 106.6.¹⁷ The communications in paragraphs [54-Exhibit B] and [60-Exhibit D] are generic voter drives that do not mention a specific candidate. As such they must be paid with entirely Federal funds or allocated under 11 CFR 106.6.

The communication in paragraph [5] expressly advocates the election of three clearly identified candidates, two Federal and one non-Federal. Based on the content of the message, 11 CFR 106.1(a) would require allocation among the three candidates, and a reasonable allocation would require that two-thirds of the cost be paid with funds from the Federal account.

¹⁶ Specifically, 11 CFR 100.22(a) provides that “expressly advocating” means any communication that “[u]ses phrases such as ‘vote for the President,’ ‘re-elect your Congressman,’ ‘support the Democratic nominee,’ ‘cast your ballot for the Republican challenger for U.S. Senate in Georgia,’ ‘Smith for Congress,’ ‘Bill McKay in ’94,’ ‘vote Pro-Life’ or ‘vote pro-Choice’ accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, ‘vote against Old Hickory,’ ‘defeat’ accompanied by a picture of one or more candidate(s), ‘reject the incumbent,’ or communications of campaign slogan(s) or individual word(s), which in context can have no other meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush’ or ‘Mondale!’ . . .”

¹⁷ This analysis is consistent with the regulations the Commission recently adopted regarding State, district and local party committee phone banks when the phone script asks people to show support for a clearly identified Federal candidate and generically refers to other candidates of the Federal candidate’s party without identifying them by name. *See* 11 CFR 106.8; 68 Fed. Reg. 64,517 (November 14, 2003).

The second message in paragraph [26] does not expressly advocate the election of President Bush, but it says that “[t]he economy under President Bush has never been better” and continues with a statement that it is the recipient’s duty to register to vote. Thus, the message promotes or supports his election and, since President Bush is the only candidate clearly identified, the message must be paid for entirely with Federal funds under 11 CFR 106.1. Similarly, the message in paragraph [69] promotes President Bush by name, and thus requires the use of only Federal funds.¹⁸

9. *May ABC use non-Federal funds to pay for voter registration and GOTV public communications that do not mention a clearly identified Federal candidate, and that are targeted to geographic areas or demographic voter groups that have been identified as Republican based on earlier voter identification efforts? This question refers to communications in paragraphs [53], [59], and [70], and pertains also to paragraphs [54] and [60].*

As a non-connected political committee, ABC must allocate payments for these activities between its Federal and non-Federal accounts because they fall within 11 CFR 106.6, or it may pay for these communications with entirely Federal funds.

Paragraphs [53] and [54-Exhibit B] involve voter registration messages by ABC, a Federal political committee, that do not mention specific candidates but “urge the general public to . . . support candidates . . . associated with [particular positions on issues].” 11 CFR 106.6(b)(2)(iii). Paragraph [53] includes the statement, “From the war on terror, to cutting taxes, to improving education – we all have a duty to elect leaders who put America first and not the liberal special interest groups.” The messages in paragraphs [53] and [54-Exhibit B] would be allocable under 11 CFR 106.6, and may be paid for with non-Federal funds only to the extent permitted under 11 CFR 106.6(c). The same analysis applies to the directed GOTV messages referred to in paragraphs [59] and [60-Exhibit B]. Paragraph 59 includes the sentence, “From the war on terror, to cutting taxes, to improving education – we all have a duty to elect leaders who will put America first and not the liberal special interest groups.”¹⁹

¹⁸ In paragraph [5], you ask whether the “prohibition” in 11 CFR 100.26 on “general public political advertising” pertains to materials handed out door to door (and not through mass mailings or public communications) by an “unincorporated non-Federal section 527 committee if those materials expressly advocate the election or defeat of a Federal candidate. The Commission notes that 11 CFR 100.26 contains no prohibition but merely defines the term “public communications.” A communication, such as the one in paragraph 5 that expressly advocates the election or defeat of a Federal candidate, or the one in paragraph 6, that promotes Federal candidates, is an expenditure (in part, as to paragraph 5) regardless of whether it qualifies as a public communication. The characterization as a “public communication” would only be relevant if ABC were a party committee.

¹⁹ Paragraph [59] refers to the message at issue in paragraph [58-Exhibit D]. Paragraph [58-Exhibit D] does not by itself refer to the targeting of communications presented in paragraph [59-Exhibit D] and will be discussed below.

Paragraph [70] merely states that Joe Smith is calling on behalf of ABC and asks the recipient to vote on November 2, without words encouraging support for candidates of any party or associated with any position on any issue. This communication does not mention any clearly identified candidate. Thus, it is a generic GOTV communication that must be either paid for with entirely Federal funds, or allocated under 11 CFR 106.6 between ABC's Federal and non-Federal accounts.

10. May ABC use non-Federal funds to pay for voter registration and GOTV public communications that do not mention a clearly identified Federal candidate and that are not targeted to geographic areas or demographic groups that have been identified as Republican based on earlier voter identification efforts? [58-Exhibit D]

In paragraph [58-Exhibit D], you do not refer to any partisan targeting of the audience that will receive this message. Nevertheless, this is a voter registration message distributed by a non-connected political committee that urges support for candidates associated with positions on particular issues. See 11 CFR 106.6(b)(2)(iii) and Exhibit D to the request. The communication does not reference a clearly identified candidate, does not contain express advocacy, and does not promote, support, attack, or oppose a candidate for Federal office. Thus, the communication falls within the definition of "generic voter drive" at 11 CFR 106.6(b)(2)(iii) and must be paid for, at least in part, with Federal funds under 11 CFR 106.6(c). As explained above, the portion of this generic voter drive that may be paid for with non-Federal funds is set forth in 11 CFR 106.6(c).

11. How would prior contributions by ABC to candidates affect ABC's subsequent voter registration and GOTV activities with respect to those candidates? [18], [19].

Essentially, you ask whether a prior contribution by ABC to a Federal candidate would lead to a conclusion that subsequent GOTV activities with respect to the candidate would be viewed as coordinated expenditures and constitute in-kind contributions to the candidate subject to the amount limitations and source prohibitions of the Act. The Commission concludes that a prior contribution by ABC to the candidate, in and of itself, does not establish that ABC's GOTV activities are coordinated with the candidate.

12. How would ABC's funding of voter registration or GOTV messages be affected by the fundraising for such expenses, including the content of the messages used to raise the funds? This pertains to paragraphs [55] and [61].

Paragraphs [55] and [61] ask if certain types of funds may be used for voter registration or GOTV messages if the solicitation for the funds mentions a specific Federal candidate but the eventual voter registration or GOTV communication does not. An example of such a solicitation is "Give money to an effort [or 'to a GOTV effort'] that will help President Bush and Republican candidates;" an example of the subsequent GOTV communication is, "Go out and vote. The election is important. It's your civic duty." You do not provide an example for a voter registration communication subsequent to the solicitation but, based on your question in paragraph [55], the Commission assumes that the language is similar to the GOTV communication.

These two questions implicate two different activities of ABC, its fundraising activities and its generic spending.

2 U.S.C. 431(8) provides that a contribution includes “any gift, subscription, loan advance, or deposit of money or anything of value for the purpose of influencing any election for Federal office.” The fundraising messages in paragraphs [55] and [61] indicate that the funds will be used to promote or support a clearly identified Federal candidate and do not identify any other Federal or non-Federal candidates or elections. Based on these facts, these funds are being raised to influence a Federal election. Therefore, the contributions raised will be subject to the contribution limits and source prohibitions of the Act, and ABC may not raise non-Federal funds using those fundraising messages.²⁰ To avoid the receipt of contributions in violation of the Act, ABC should make clear in its solicitations that it may accept only contributions within the limitations and prohibitions of the Act or provide other information consistent with that. *See* 11 CFR 102.5(a)(2)(iii).

As indicated above, the subsequent voter registration or GOTV messages will not refer to a Federal candidate, a political party, or generically to candidates supporting positions on specific issues. They do not have to be funded entirely with Federal funds. However, these subsequent messages must be funded as generic voter drive expenses that are allocable in accordance with 11 CFR 106.6(c).²¹

13. Do donors violate the Act by donating non-federal funds to the massive voter mobilization effort directed at the general public with the stated purpose (i.e., express advocacy) of defeating a named Federal candidate? If so, are they subject to criminal penalties if they know from fundraising appeals that the purpose of their contribution is the defeat of a specific Federal candidate? Does it matter if the stated public purpose is the defeat of a specific candidate but all the messages themselves from ABC do not contain express advocacy? [48]

Requests pertaining to the activities of a third party do not qualify as advisory opinion requests. 11 CFR 112.1(b). Moreover, an advisory opinion request must include a complete description of all facts relevant to the specific transaction. 11 CFR 112.1(c). Paragraph [48] presents questions as to the activities of third parties, including potentially large numbers of donors in a variety of circumstances.

²⁰ These communications are not a mixed Federal/non-Federal fundraising activity and therefore are not subject to 11 CFR 106.6(d).

²¹ The Commission notes that the definition of “generic voter drives” in 11 CFR 106.6(b)(2)(iii) includes “voter identification, voter registration, and get-out-the-vote-drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.” The plain reading of this language indicates that the phrase “candidates of a particular party or associated with a particular issue” applies to the word “support” but does not apply to the other activities mentioned in the regulation.

14. May ABC use non-Federal funds to pay for voter identification communications that clearly identify a Federal candidate and that ask questions in a manner that promotes his candidacy? [67-Exhibit F]

No. Paragraph [67-Exhibit F] refers to mass mailings and telephone banks to identify voters, which candidates they support, and which issues motivate them. The message will contain several questions such as “Do you believe your taxes are too high?” and “Are you in favor of improving education?”, along with questions such as “Are you in favor of President Bush’s efforts to lower taxes?” or his “efforts to improve education?” or his “efforts for a strong defense?” The communication will finish with a question as to whether the reader or listener intends to vote on November 2. No other candidate is mentioned. This communication promotes and supports President Bush by referencing his “efforts to improve education” and his “efforts for a strong defense.” Consistent with the analysis above, it must be paid for entirely with Federal funds.

Fundraising

15. ABC wishes to have Federal officeholders and candidates assist in its fundraising activities as permitted by the Act. May Federal officeholders and candidates raise funds for ABC’s Federal account? [38]

Yes, a Federal officeholder or candidate may solicit funds for ABC’s Federal account if he or she only asks for Federally permissible funds. *See* Advisory Opinions 2003-36, 2003-5 and 2003-3.

11 CFR 102.5(a)(2) provides that contributions that were designated for ABC’s Federal account, or that result from a solicitation that expressly states that the contribution will be used in connection with a Federal election, or that are from contributors who have been informed that all contributions are subject to the prohibitions and limitations of the Act, may be deposited in ABC’s Federal account. *See, e.g.,* Advisory Opinion 2000-25. Because ABC is a political committee, contributions to ABC’s Federal account must meet at least one of these criteria.

16. ABC wishes to have Federal officeholders and candidates assist in its fundraising activities as permitted by the Act. May Federal officeholders and candidates raise funds for ABC’s non-Federal account? [39]

Yes, if the Federal officeholders or candidates only ask for funds that are not in excess of the amounts permitted with respect to contributions to candidates under 2 U.S.C. 441a(a), and that are not from sources prohibited by the Act from making contributions in connection with an election for Federal office.

As amended by BCRA, the Act regulates certain actions of Federal candidates and officeholders,²² their agents,²³ and entities directly or indirectly established, financed, maintained, or controlled by them²⁴ (together, “covered persons”) when they raise or spend funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission’s rules implementing BCRA prohibit covered persons from soliciting, receiving, directing, transferring, or spending “funds in connection with any election other than an election for Federal office” “unless the funds are not in excess of the amounts permitted with respect to contributions to candidates and political committees” under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the Act from making contributions in connection with an election for Federal office. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.²⁵ See Advisory Opinions 2003-36 and 2003-03.

17. May Federal officeholders or candidates attend and/or speak at fundraising events for ABC’s non-Federal account that raises funds outside the Act’s contribution and source limitations? [40] and [41]

Yes, Federal officeholders and candidates may attend and speak at fundraising events for ABC’s non-Federal account that raise funds outside the Act’s contribution limits and source prohibitions, but they may not solicit funds that are outside the amount limitations and source prohibitions of the Act. Advisory Opinions 2003-36 and 2003-03.

The scope of a covered person’s potential liability under 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62 must be determined by his or her own speech and actions in asking for funds or those of his or her agents, but not by the speech or actions of another person outside his or her control. Commission regulations establish that a Federal officeholder or candidate will not be held liable for soliciting funds in violation of section 441i(e)(1)(B) or section 300.62 merely by virtue of attending or participating in any manner in connection with a fundraising event at which non-Federal funds are raised. To be liable, the Federal candidate must “ask” for non-Federal funds. *Id.*; see also 11 CFR 300.2(m),(n); *McConnell*, 124 S.Ct. at 670; and “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,” 67 Fed. Reg. 49,064, 49,086-49,087 (July 29, 2002).²⁶

²² Under 2 U.S.C. 431(3), “Federal office” means “the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.” See also 11 CFR 100.4.

²³ 11 CFR 300.2(b)(3).

²⁴ 11 CFR 300.60.

²⁵ Under the Act, the following persons may not contribute in connection with a Federal election: National banks, corporations, and labor organizations (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e). It is unlawful for the following persons to contribute or donate in connection with *any* election: National banks and corporations organized by authority of Congress (2 U.S.C. 441b) and foreign nationals (2 U.S.C. 441e).

²⁶ In *McConnell*, the Court made clear that section 441i as enacted by Congress “permit[s] a wide range of joint planning and electioneering activity ... ‘BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fundraising goals with one another.’” 124 S.Ct. at 670, quoting Brief for Intervenor-Defendants Sen. John McCain et al. in No. 02-1674 et al., p.22. The Supreme Court concluded that the Commission’s interpretation of the statute was consistent with the construction offered by Intervenor McCain et al. in their brief. *Id.*

Thus, the scope of a covered person's potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62 will be determined by his or her own speech and actions in asking for funds or those of his or her agents, but not by the speech or actions of another person outside his or her control. *See* Advisory Opinions 2003-36, 2003-05 and 2003-03.

If a covered person makes a solicitation, such solicitation must include or be accompanied by a clear and conspicuous message indicating that the covered individual is only asking for funds that comply with the amount limitations and source prohibitions of the Act. The following is considered to be an adequate disclaimer:

I am asking for a donation of up to \$5,000 per year. I am not asking for funds from corporations, labor organizations, or other Federally prohibited sources.

If a covered person gives a speech soliciting funds generally without mentioning specific amounts, sources, or limitations, he may do so if written notices are clearly and conspicuously displayed at the event indicating that the covered person is soliciting only Federally permissible funds;²⁷ or if a public oral disclaimer is made. *See* Advisory Opinions 2003-36 and 2003-03.

18. May Federal officeholders or candidates be named in the invitation as honored guests, or as featured speakers, or as hosts, for fundraising events for ABC's non-Federal account? [42]

Yes, within the limits of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. Section 441i(e)(1)(B) and section 300.62 only apply to an invitation to an event where that invitation constitutes a solicitation for funds, and where the covered person approved, authorized, or agreed or consented to be featured, or named in, the invitation (e.g., through the use of his name or likeness). The mere mention of a covered person in the text of a written invitation does not, without more, constitute a solicitation or direction of non-Federal funds by that covered person. However, a candidate's consent or agreement to be mentioned in an invitation as an honored guest, featured speaker or host, where that invitation is a solicitation, constitutes a solicitation by the candidate. Thus, if a candidate agrees or consents to be named in a fundraising solicitation as an honored guest, featured speaker or host, or if the invitation constitutes a solicitation for any other reason, then the solicitation must contain a clear and conspicuous statement that the entire solicitation is limited to funds that comply with the amount limits and source prohibitions of the Act. *See generally* Advisory Opinions 2003-36 and 2003-03.

Complying with these requirements regarding the written invitation does not relieve the covered person of the requirements as to his or her actual appearance at the subsequent event as an honored guest or featured speaker, as set out in the responses to questions 16 and 17. The requirements set out in response to question 17 as to the speech and disclaimer

²⁷ *See* 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

by the covered person, clear and conspicuous written notices, and conversations by the covered person are still applicable.

19. May Federal officeholders or candidates sign written solicitations for the non-Federal account that raise funds outside the Act's contribution and source limitations? [43]

No. Federal officeholders and candidates may not sign written solicitations for ABC's non-Federal account that raise funds outside the Act's contribution limits and source prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; Advisory Opinion 2003-03.

20. If Federal officeholders or candidates cannot speak or participate in a fundraising event for ABC's non-Federal account, may ABC have a fundraiser for its Federal account with the Federal officeholders and candidates present, and then immediately adjourn to an adjacent location for a non-Federal soft dollar fundraising event at which the Federal officeholders and candidates are not present? [44]

This question is moot in light of the answer to question 17.

21. May ABC solicit Federal funds by using the names of specific Federal candidates in solicitations that will convey ABC's support for or opposition to specific Federal candidates, assuming no coordination between ABC and any Federal candidates? Solicitations for Federal funds would be through mass mailings and broadcast advertising. For example, could ABC use the following message: "ABC supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we can support President Bush's agenda." Or, could ABC use the following message: "ABC supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we can support President Bush's reelection." [24], [25]

Yes. Although ABC will use the names of specific Federal candidates in solicitations, ABC will not coordinate with the candidates, and the candidates will not solicit, receive, direct, transfer, spend or disburse funds outside of the amount limitations, source prohibitions or reporting requirements of the Act.²⁸ Thus, neither 2 U.S.C. 441i(e)(1)(A), nor 11 CFR 300.61, nor any other provision of the Act or Commission regulations, would bar ABC's fundraising through the use of the names of specific Federal candidates in a manner that will convey ABC's support for or opposition to specific Federal candidates.²⁹

22. May ABC solicit non-Federal funds by using the names of specific Federal candidates in solicitations that will convey ABC's support for or opposition to specific Federal candidates, assuming no coordination between ABC and any Federal candidates? Solicitations for non-Federal funds would be through mass mailings, broadcast

²⁸ It is clear from your request that 2 U.S.C. 441h(b) is not at issue here.

²⁹ Please see the answer to question 15, above, regarding the conditions for deposit of Federal funds under 11 CFR 102.5.

advertising, and in person solicitations using printed materials and taped messages. Could ABC use the messages presented in the immediately preceding question for this purpose? [25]

No. 2 U.S.C. 431(8) provides that a contribution includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” If ABC, which is a political committee, solicits funds by using the names of specific Federal candidates in a manner that will convey ABC’s plan to use those funds to support or oppose specific Federal candidates such as “Give to ABC so we can support President Bush’s reelection,” the funds raised will be contributions to ABC subject to the Act’s contribution limits and source prohibitions.³⁰ *Id.*

23. *May ABC sponsor an issues forum at which Federal officeholders or candidates speak, and then adjourn later in the same day to a different location for a non-Federal fundraiser that is not attended by Federal officeholders or candidates? The invitation to this event would include two separate pieces, each with its own disclaimer. One would be for the issues forum alone and would contain no electioneering or fundraising message. The second piece would be a fundraising piece for the non-Federal dollar fundraising that either did not mention or include Federal officeholders and candidates or, in the alternative, included Federal officeholders and candidates only to the extent permitted by the Commission. [45]*

Yes, as a non-connected political committee, ABC may sponsor an issues forum, which the Commission understands you intend to be a forum in which solicitations for funds do not occur. As explained in the answers to question 17, a covered person may be included on the invitations, subject to the limits of section 441i(e)(1)(B) and section 300.62. A Federal officeholder or candidate may speak at ABC’s issues forum. However, the invitation to the issues forum and the fundraising solicitation must be in separate mailings, or the entire mailing must satisfy the conditions set out in the answer to question 18, above.

24. *May ABC raise and spend funds from its non-Federal accounts from foreign nationals and from foreign corporations and labor organizations for voter registration and voter mobilization activities on behalf of Federal candidates with express advocacy (e.g., “register to help reelect President Bush”) or with an issue advocacy message outside the 30 or 60 day windows (e.g., “Register. It’s your duty.”)? [49]*

No. The Act, as amended by BCRA, prohibits foreign nationals³¹ from, among other things, directly or indirectly making a contribution or donation of money or other

³⁰ The Commission notes that the joint fundraising rules at 11 CFR 106.6(d) do not apply to the solicitation about which you inquire.

³¹ The following are considered foreign nationals for purposes of the Act: foreign governments; foreign political parties; foreign corporations; foreign associations; foreign partnerships; individuals with foreign citizenship; and United States immigrants who do not have a “green card.” 11 CFR 110.20(a)(3).

thing of value, or to expressly or impliedly promise to make a contribution or donation, in connection with a Federal, State, or local election (this prohibition is not limited to elections for political office). 2 U.S.C. 441e(a)(1)(A); 11 CFR 110.20. Also, it is unlawful for a person to solicit, accept, or receive a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2). 11 CFR 110.20(g) provides that no person shall knowingly solicit, accept or receive a contribution or donation from a foreign national, and 11 CFR 110.20(h) provides that no person shall knowingly provide substantial assistance in the making of an expenditure, independent expenditure or donation by a foreign national. Accordingly, ABC must not deposit such funds into its Federal or non-Federal account. Nothing in the Act or Commission regulations creates an exception on the basis of the political committee's intended use for the foreign national funds.

25. If Federal candidates or officeholders participate in the requestors' fundraising activities in any scenario above, would they be "solicit[ing] . . . funds in connection with an election other than an election for Federal office" under 2 U.S.C. 441i(e)(1)(B)? [46]

The Commission cannot resolve whether any of the fundraising scenarios you generally describe above are in connection with any election other than an election for Federal office without more specific information regarding those communications (e.g., none of the exhibits to ABC's request for an advisory opinion identify a candidate for State, district or local political office). As such, this question is hypothetical and it presents a general question of interpretation of the Act, rather than a specific transaction or activity, and is thus not proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

The Commission expresses no opinion regarding qualification for tax treatment under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal Revenue Code because those questions are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub
Vice Chair

Enclosures (AOs 2003-36, 2003-5, 2003-3, and 2000-25)

[CLICK HERE TO VIEW APPENDIX A.](#)